

\*E-Filed 7/13/10\*

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SWISH MARKETING, INC., a  
corporation,

MARK BENNING, individually and as an  
officer of SWISH MARKETING, INC.,

MATTHEW PATTERSON, individually  
and as an officer of SWISH  
MARKETING, INC., and

JASON STROBER, individually and as  
an officer of SWISH MARKETING,  
INC.,

Defendants.

Case No. C09-03814 RS

**STIPULATION AND ~~PROPOSED~~  
PROTECTIVE ORDER  
REGARDING CONFIDENTIAL  
TREATMENT OF SENSITIVE  
PERSONALLY IDENTIFIABLE  
INFORMATION**

Certain materials to be produced in connection with this litigation contain sensitive personally identifiable information ("PII"). PII includes an individual's Social Security

1 number, or an individual's name or address or phone number in combination with one or  
2 more of the following: date of birth; driver's license number or other state identification  
3 number, or a foreign country equivalent; passport number; financial account number; or  
4 credit card or debit card number. To protect such information, Plaintiff Federal Trade  
5 Commission ("FTC") and Defendants Swish Marketing, Inc., Mark Benning, Matthew  
6 Patterson, and Jason Strober ("Defendants") hereby stipulate to and request that the Court  
7 enter an Order requiring that:

8 1. PII may be designated confidential by any party, and thereby made subject  
9 to the provisions of this Order.

10 2. PII shall be secured by any receiving party in such a manner as to minimize  
11 the possibility of unintentional disclosure, including the physical storage thereof in a  
12 secure area or law office, the electronic storage thereof on a password-protected computer  
13 or system which may be accessed only by persons qualified to have access to PII pursuant  
14 to the terms of this Order, and the shipment thereof only to other qualified persons by a  
15 trackable method with restricted delivery to such qualified persons.

16 3. PII shall not be used for any purpose by the receiving party except  
17 for purposes in connection with this litigation.

18 4. A receiving party shall not disclose PII to any person, except the following  
19 persons:

20 (a) Defendants, including the executives or other personnel of  
21 Defendants who are participants with respect to policy decisions for the trial or pretrial  
22 preparations with reference to this action and any other personnel of Defendants having a  
23 good-faith, reasonable need for obtaining access to PII;

24 (b) FTC Commissioners and other employees of the FTC (including  
25 consultants not covered under Subparagraph 4(c) below), the parties' respective counsel  
26 of record in this action, including the associates and paralegal, secretarial, clerical, and  
27 other regular and temporary employees of such counsel assisting such counsel and  
28

1 including employees of any firm retained to reproduce or store PII for use in accordance  
2 with this Order;

3 (c) The independent experts or consultants retained or consulted by the  
4 parties in this action, including the employees of such experts or consultants who are  
5 assigned to assist such experts or consultants;

6 (d) Any person who is a witness or witness's counsel at deposition or  
7 trial where the PII is reasonably related to the testimony of such witness, and court  
8 reporters and persons preparing transcripts of testimony;

9 (e) The Court and related officials involved in this litigation or any other  
10 proceeding in which PII is used, including judges, magistrates, commissioners, referees,  
11 jurors, and other personnel of the Court; provided, however, that PII shall be lodged or  
12 filed with the Court in accordance with the procedures for filing under seal as described  
13 in Paragraph 7 below; and

14 (f) Any person designated by the Court in the interest of justice, upon  
15 such terms as the Court deems proper,  
16 *provided that*, nothing in this Order shall impose any restrictions on the disclosure of PII  
17 by the FTC as provided by: (1) Sections 4.11(a) to (e) of the FTC's Rules of Practice and  
18 any cases construing them; (2) Sections 6(f) and 21 of the Federal Trade Commission Act  
19 and any cases construing them; and (3) any other legal obligation imposed upon the FTC.

20 5. Prior to disclosing PII to any person listed in Subparagraph 4(c), the  
21 receiving party shall:

22 (a) provide such person with a copy of this Order; and

23 (b) obtain from such person a signed statement in the form attached  
24 hereto as Exhibit A. Such statement shall be retained by counsel for the party and need  
25 not be filed with the Court or served upon opposing counsel unless requested for good  
26 cause or ordered by the Court.

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1           6.     Any person listed in Subparagraphs 4(a) through 4(c) who receives PII  
2 shall:

3                   (a)     read this Order;

4                   (b)     use PII only for purposes permitted by this Order; and

5                   (c)     not disclose or discuss PII other than as permitted by this Order.

6           7.     PII that is lodged or filed with the Court shall be lodged or filed pursuant to  
7 this Order in a sealed envelope or other appropriate sealed container marked in the  
8 manner required by the Court and Local Rule 79-5 for lodging and filing such materials  
9 under seal. Nothing contained in this Order shall be construed to limit the requirements  
10 of Local Rule 3-17(a) to redact, exclude, or submit under seal any information or  
11 documents described in that rule.

12          8.     Nothing contained herein shall be construed to prejudice any party's right to  
13 use PII or other information for any purpose in this litigation.

14          9.     In the case of any accidental or inadvertent disclosure of PII, counsel for the  
15 party responsible for the disclosure shall promptly notify the parties' respective counsel  
16 of the disclosure and make every effort to prevent further disclosure, including attempting  
17 to retrieve all copies of the PII from the recipients thereof, and attempting to secure the  
18 agreement of the recipients not to further disseminate the PII in any form.

19          10.    At the time that any consultant, expert, or other person retained to assist  
20 counsel in this action concludes participation in this action, such person shall return to  
21 counsel all copies of PII that are in the possession of such person or certify as to their  
22 destruction. Furthermore, within thirty days after the completion of this litigation PII  
23 shall be collected by counsel for the receiving party and either destroyed or returned to  
24 the party who produced the materials. For purposes of this Order, this action shall be  
25 considered completed when the entire proceeding has been resolved and any related  
26 orders have become final and non-appealable.

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11. All parties and other persons who receive PII shall be under a continuing duty not to disclose such materials, except as permitted in this Order, and this duty shall continue in full force and effect after the completion of this litigation.

Respectfully submitted,

DATED: July 12, 2010

/s/ Evan Rose  
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KERRY O'BRIEN  
EVAN ROSE  
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Attorneys for Plaintiff  
FEDERAL TRADE COMMISSION

(The filer attests that concurrence in the filing of this document has been obtained from each of the other signatories.)

DATED: July 12, 2010

/s/ Brian Grossman  
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Attorneys for Defendants  
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MATTHEW PATTERSON, and  
JASON STROBER


DATED: July 12, 2010

/s/ Jay Fowler  
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JAY FOWLER  
ELIZABETH D. LEAR  
BERGESON, LLP

Attorneys for Defendant  
MARK BENNING

**PURSUANT TO STIPULATION, IT IS SO ORDERED:**

DATED: 7/13/10

  
RICHARD SEEBORG  
UNITED STATES DISTRICT JUDGE